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ABSTRACT

Use of nationally standardized tests to determine teacher competency continues to be a subject for review in state and federal courts. School district policies have promoted minimum score requirements as a basis for employment decisions concerning certification, hiring, renewal, promotion, and merit pay. Legal challenges to these policies focus upon the constitutional guarantees of due process and equal protection and on the "disparate impact" provisions of Title VII of the Civil Rights Act of 1964. The most often utilized objective test is the National Teacher's Examination. The extent to which districts can rely upon competency testing in setting policy is uncertain. Sole reliance on a test for making adverse employment decisions, or setting salary differentials or standards for merit pay, however, remains a suspect practice particularly where discrimination is at issue. Legal challenges may increase as teachers' unions and civil rights groups target testing in situations other than certification. School boards should draft testing policies that correspond to appropriate educational objectives. Employees should be advised of identified deficiencies and should be provided with opportunities for reexamination. Despite reluctance to intervene in educational policymaking, judges often are sensitive to employment litigation that cross-cuts social issues. To minimize complications, an agreement between parties may permit equitable use of competency examinations. (CJH)

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Objective Testing to Assess Teacher Competency: Emerging Legal Issues

Joseph C. Beckham

Local school districts and state education agencies who adopt standardized examinations as a measure for determining teacher competency must be alert to an array of legal constraints applicable to the use of these devices. State mandates for teacher competency testing as a basis for certification have been judicially upheld where the test focused on minimum standards of literacy and knowledge within a particular discipline or educational field. However, use of standardized testing as a basis for recertification, promotion, renewal, career ladder or merit pay involves an extension of teacher competency testing into the area of performance evaluation. In these instances, other performance appraisal indices may contradict or conflict with test results, forcing heightened judicial scrutiny of the use of teacher competency tests.

Legal Challenges to Competency Testing

Education agencies who utilize standardized testing because of its objective and quantifiable results may be confronted with complaints that the tests promote bias and fail to measure teacher competence. When test results serve as a basis for employment decision-making, these tests may deny due process or equal protection under the fourteenth amendment or violate federal anti-discrimination statutes.[1] Whether the school district or state department of education elects to use existing tests, such as the National Teacher's Examination (NTE), or to construct a "customized" examination, specification of the intended purpose for the test and elaboration and implementation of a validation strategy to realize that purpose are critical dimensions in withstanding legal challenge.

1. *See* Linn, *Teacher Competency Testing: A Review of Legal Considerations*, 17 West's Educ. L. Rep. 811 and Strassle, *Minimum Competency Testing of Teachers for Certification: Due Process, Equal Protection and Title VII Implications*, 70 Cornell L. Rev. 494 (1985).

EA 018 737

Rational Basis

In development and implementation of any competency testing procedure a school district or state agency must be able to establish that the classification scheme is reasonable and rationally related to a valid state purpose. For example, in *Armstead v. Starkville Municipal Separate School District*,[2], the Fifth Circuit Court of Appeals dealt with a situation in which a Mississippi school district required incumbent teachers and future applicants to achieve a minimum score on the Graduate Record Examination (GRE). No validation tests or studies had been undertaken by the school district to establish that this test was reasonably related to the purpose for which it was used. The Fifth Circuit stated that it did not need to consider the issue of racial discrimination because the use of the GRE was unconstitutional under a limited equal protection analysis. The court concluded that the classification was not reasonably related to the purpose for which it was used, stating:

> We agree with the lower court's finding that the GRE score requirement was not a reliable or valid measure for choosing good teachers. It was undisputed that the GRE was not designed to and could not measure the competency of a teacher or even indicate future teacher effectiveness. However, it was established that the cutoff score would eliminate some good teachers. Consequently, we find that it has no reasonable function in the teacher selection process.[3]

Armstead was cited as guiding precedent by a federal district court in *Georgia Association of Educators v. Nix*.[4] *Nix* centered on one aspect of teacher certification established by the Georgia State Board of Education which required use of a minimum NTE score as an alternative requirement for the "T-6" six-year certificate, one of the highest certification levels in the system. Despite the fact that no empirical research had been undertaken to establish that the minimum score was valid for the purpose, the board stipulated two objectives of the policy:

> To insure that the teacher achieving a six-year certificate has, in fact, gained valuable new knowledge as a result of his extra education; and as a device to recognize a superior or "master teacher" who should be rewarded with a higher salary level.[5]

The district court declined to rule on the racially discriminatory nature of the NTE minimum score standard, and held that the use of the NTE in the six-year certification process violated equal protection because the classification requirement could not be shown to rationally relate to the purpose for which it was intended. The court noted that no

2. 461 F.2d 276 (5th Cir. 1972).
3. *Id.* at 280.
4. 407 F. Supp. 1102 (N.D. Ga. 1976).
5. *Id.* at 431.

evidence had been offered which would establish that the use of the NTE furthered the purposes articulated in the "T-6" certification objectives. Although the record disclosed that the NTE was designed for recent college graduates to measure knowledge gained in undergraduate school, the court concluded that the NTE had not been shown to correlate with the knowledge one might achieve in completing the proposed alternative six-year certification requirement (completion of doctoral level coursework in education) or that the NTE requirement assessed learning in postgraduate courses. Consequently, use of the NTE for advanced level certification was held to be an arbitrary classification scheme.[6]

Strict Scrutiny

The United States Supreme Court has noted that the discriminatory impact of an employment test must be traced to a racially discriminatory purpose before the heightened scrutiny standards of the equal protection clause will apply.[7] A showing of adverse racial impact in the use of an objective test would not make out a case of discrimination in the absence of proof of discriminatory intent, nor would the equal protection clause prohibit an education agency from seeking to upgrade the communicative abilities or knowledge level of school employees, where those employees are clearly in jobs that require special abilities to communicate orally and in writing. If the employment test is neutral on its face and rationally related to a valid state purpose, then its adverse consequences for a particular minority group would not be an issue under constitutional standards of equal protection. The notion that an allegation of racial discrimination violative of equal protection must be linked to a racially discriminatory purpose on the part of the state was applied in the context of teacher competency testing when the United States challenged a state's use of NTE scores for the purpose of awarding teacher certification and determining salary compensation. In *United States v. South Carolina*,[8] South Carolina was charged with violating equal protection of the laws under the fourteenth amendment because proportionately more black than white candidates for teacher certification failed to achieve minimum scores on the NTE. The test had been adopted in South Carolina on the basis that it was objectively scored and provided a content-validated measure of the extent to which prospective teachers had mastered the subject matter of accredited teacher training programs. Use of the NTE resulted in substantially greater proportions of blacks than whites being excluded from state certification and salary subsidies.

In considering the fourteenth amendment equal protection challenge, a three-judge federal district court upheld the use of the NTE, stating

6. *Id.* at 431-432.
7. Washington v. Davis, 426 U.S. 229 (1976).
8. 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978).

that South Carolina's "use of the NTE for both certification and pay purposes meets the rational relationship standard ... and consequently does not violate the equal protection clause of the fourteenth amendment."[9] The district court held that South Carolina had the authority to define minimal competence and found that plaintiffs did not demonstrate the required discriminatory intent with respect to the use of the NTE scores for setting certification standards. As to use of the NTE for salary purposes, the court noted that classifications of teachers' certificates, based in part on NTE scores, were used by the state to determine the amount of state aid to be allotted to school districts. Although the state aid schedule provided fewer benefits and incentives for classifications which contained proportionately more black than white teachers, the court again found no direct evidence of an intent to discriminate.

In a case decided on similar equal protection grounds, *Moore v. Tangipahoa Parish School District*,[10] a black teacher, terminated for refusing to take the NTE, challenged use of the examination as an evaluative tool in desegregation-related staff reductions. The teacher contended that the adoption of an NTE score requirement as a condition of re-employment was racially motivated. The Fifth Circuit Court of Appeals noted that adoption of the NTE requirement would be impermissible when shown to be motivated by a discriminatory purpose, but declined to overrule a determination that use of the NTE was objective and the teacher's termination for refusal to take the test did not violate equal protection. Citing *United States v. South Carolina*, the court held that the use of NTE scores in evaluating teachers is permissible in the absence of a showing that adoption of the NTE requirement was motivated by a discriminatory purpose.[11]

The use of *United States v. South Carolina* as a precedent in resolving *Moore*, extends the logic of that decision from a situation involving the certification of prospective teachers to one in which a teacher's renewal is at stake. In *United States v. South Carolina*, the rational relationship between the state's legitimate objective of providing an incentive for professional improvement and the use of the NTE for determining salary levels was upheld because "teachers without adequate knowledge to teach effectively will upgrade their capability."[12] With respect to the use of the NTE for certification, the court found that mere graduation from an accredited training institution, an alternative with less disparate impact on blacks, would not "achieve the state's purpose in certifying minimally competent persons equally well as the use of a content-validated standardized test."[13] The three-judge federal district court examined the content-validity of the test only insofar as it compared with the curriculum of South Carolina's teacher training institu-

9. *Id.* at 1100-1102.
10. 594 F.2d 489 (5th Cir. 1979).
11. *Id.* at 37.
12. 445 F. Supp. at 1116.
13. *Id.* at 1115-1116.

tions. *Moore* is unique because the federal court ignored the issue of NTE validity relative to the teacher's actual job performance, a central question because the employment decision involved re-employment rather than initial certification.

Disparate Impact

The principal federal statutory limitation on teacher competency testing involves the disparate impact provision of title VII of the Civil Rights Act of 1964.[14] The United States Supreme Court has emphasized that the disparate impact provisions of title VII focus on employment practices that appear to be fair in form, but which have a discriminatory consequence.[15] Where plaintiffs contend that the effect of a test requirement is to exclude a disproportionate number of an identifiable minority from employment, title VII would be invoked to compel an employer to establish that the requirement bears a demonstrable relationship to successful job performance.[16] The High Court has summarized its view of title VII by saying, "Nothing in the Act precludes the use of testing or measuring procedures; ... What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."[17]

Title VII cases emphasize that there must first be a showing that the competency examination has an adverse impact on the employment opportunities of members of an identifiable sex, race or ethnic group.[18] Once it is established that the impact or consequence of the testing program or selection criteria is discriminatory in effect, judicial injury will force the employer to justify the requirement as having a manifest relation to the proposed employment.[19] The employer will thus bear the evidentiary burden of demonstrating the validity of the employment practice whether the practice relates to certification, selection, retention, or termination.

The validation strategy utilized in *United States v. South Carolina*[20] illustrates the applicable standards of title VII relative to teacher certification examinations. The district court reviewed a content validity study which was asserted to justify the continued use of the NTE for

14. 42 U.S.C. § 2000e (1982).
15. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
16. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
17. 401 U.S. at 436.
18. *See* Albemarle Paper Co., 422 U.S. at 425 n.n.15-17, 19.
19. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court focused on job-relatedness without mentioning a requirement of business necessity. In Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977), however, the Court stated that a challenged selection standard must be "necessary to safe and efficient job performance." Later, in New York Transit Auth. v. Beazer, 440 U.S. 568 (1979), the Court indicated that proof of strict necessity is not necessary as long as the selection standard bears a "manifest relationship to the employment in question." *Id.* at 587 n.31 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).
20. 445 F. Supp. 1094.

teacher certification and salary level determination under state guidelines. The study was based upon the judgments of two panels of teacher-educators drawn from South Carolina's twenty-five teacher-training institutions. A "content review" panel was asked to decide whether each question on the tests involved subject-matter that was a part of the curriculum of South Carolina's teacher-training institutions, and a "minimum score" panel was requested to estimate the percentage of minimally qualified applicants who would answer each question correctly. Only test questions that had been determined by a majority of the content review panel to be content valid for use in South Carolina were used in making the minimum score estimates. After receiving the recommended minimum scores, the South Carolina State Board of Education considered a variety of factors (e.g., standard error of measurement, sampling error, reliability) in determining to lower the recommended minimum scores for each test by one, two or three standard errors of measurement.

In meeting its burden to show that reliance upon the certification examination met the "business necessity" test of title VII, South Carolina was able to convince the court that the validation strategy developed for use of the NTE insured that the test would not create an artificial, arbitrary or discriminatory barrier to those denied certification or salary supplements. The court presumed that training program validation was sufficient aside from the possible relationship between the test and actual job performance.[21]

In a case which takes the reasoning of *United States v. South Carolina* a step further, the Fourth Circuit Court of Appeals held the use of the NTE for the purpose of granting teacher pay raises to be justified in order to improve the ability of the school district to attract the best qualified teachers and to encourage district teachers to supplement their study and improve their knowledge of those teaching skills which the NTE validity evaluated.[22] The school board policy had a disproportionate impact on black teachers, denying pay raises to 2% of white teachers and 38.6% of black teachers within the district.

In this case, the federal appeals court made no distinction between pay raises for teachers who achieved high scores on the NTE and the award of a salary supplement to teachers who met certification requirements based on NTE minimum scores. Both objectives, the court concluded, were intended to improve the quality of teaching. If the NTE could be used to create salary differentials between certified and uncertified teachers, as in *United States v. South Carolina*, it could appropriately be used to create salary differentials among certified teachers with different scores on the examination.[23]

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21. *See* Washington v. Davis, 426 U.S. 229 (1976) for a case in which the Court accepted the use of a test as a screening device for police recruits who sought admission to a training program.

22. Newman v. Crews, 651 F.2d 222 (4th Cir. 1981).

23. *Id.* at 225.

The circuit court's opinion also considered a contention that the use of a teacher performance evaluation system provided an alternative to the use of test scores and would achieve the business purpose of improving the quality of teaching with a less harsh discriminatory effect. While the court granted that such a performance evaluation system might be useful in identifying areas for teacher improvement, it took notice of the fact that the existing evaluation system was subjective and inexact and concluded there was no reason to suppose such a system would not involve substantial potential for discrimination, particularly when compared with what the court described as the "complete objectivity" of the NTE.[24]

Not all cases involving the use of NTE in employee evaluation have justified reliance on the test. An Alabama school board, acting on the recommendation of a study commission, adopted a policy that a minimum score on the NTE was necessary for employment of new applicants and re-employment of annual contract teachers. During the four-year period in which this requirement, or a limited modification thereof, was applicable to teachers in Mobile County, Alabama, the school system had a black teacher population of between 36% and 39%. For the same period, seventy-seven nontenured teachers were not re-employed solely because they failed to meet the minimum score requirement. Fifty-one of these teachers were black, representing 66% to 67% of the total not re-employed.

In a title VII claim for a preliminary injunction prohibiting implementation of the policy, a federal district court was asked to determine if there was sufficient likelihood of success on the merits or potential irreparable harm to the non-renewed teachers to justify a preliminary injuction prohibiting the use of the test. The district court granted the injunction against use of the test on the basis that the minimum score requirement may well constitute an artificial, arbitrary barrier to employment that would operate invidiously to discriminate on the basis of race.[25]

In reaching this conclusion, the court took note of the NTE's unvarying history of adverse racial impact and the disclaimers within the NTE's guidelines which discourage use of the test with arbitrary cut-off scores. Since the school district was utilizing a cut-off score on the NTE as an employment selection device without prior investigation of its probable consequence, the court was of the opinion that there was an increased likelihood that the board was misusing the examination in a way that would adversely affect black teachers in the system.[26]

The Alabama school board's failure to follow the admonitions of the testing service in using test results and adopting a minimum cut-off score were the critical factors in the federal district court's decision to

24. *Id.*
25. York v. Alabama State Bd. of Educ., 581 F. Supp. 779 (M.D. Ala. 1984).
26. *Id.*

award a preliminary injunction.[27] Regrettably, the court did not address the fact that the black teachers within the class affected by the policy had been evaluated and recommended for renewal by their respective principals. As the testing service specifically asserted in its guidelines for use of the test,

> [t]he NTE measures academic preparation for teaching, not the act of teaching itself; and the critical criterion in evaluating an inservice teacher is not potential but actual teaching performance. If an adequate and reliable record of a teacher's inservice performance is available, that record should be used.[28]

Due Process

Although courts have not addressed due process claims in the context of teacher competency testing, *Debra P. v. Turlington*[29] is an analogous case which considers the due process argument in the context of student competency testing. In *Debra P.*, both the district court and the court of appeals found that withholding high school diplomas from students who failed a minimum competency test constituted denial of due process. The district court held that the students' legitimate expectation that satisfactory attendance and completion of required courses would result in the receipt of a diploma created a constitutionally protected property interest.[30] The district court also found that students had a constitutionally protected liberty interest in being free of the stigma associated with failure to earn a high school diploma.[31] The court of appeals based its decision that the test violated due process upon the finding of a property right alone.[32]

Federal courts are unlikely to find that graduates of teacher training programs have a protected property interest in teacher certification. However, the use of teacher competency testing in the context of recertification, contract renewal or the award of job benefits may offer a basis for establishing a legitimate claim of entitlement to continuing employment. Individuals in these latter categories may assert a genuine entitlement to employment that may rise to the level of a property right protected under due process of law.[33]

While it is unlikely that a court would recognize a stigma of sufficient magnitude to invoke constitutional due process protections for employ-

27. *Id.* at 783-786. In particular, the court noted that the school district had adopted percentile ranks as cut-off standards and failed to investigate the probable discriminatory consequences of the cut-off score prior to implementation.

28. 581 F. Supp. at 781.

29. 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated and remanded in part*, 644 F.2d 397, *reh'g denied*, 654 F.2d 1079 (5th Cir. 1981).

30. *Id.*

31. *Id.* at 266.

32. 644 F.2d at 404.

33. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). In the Roth case, a nontenured teacher was not re-employed subsequent to a one-year contract, and was not given the same procedural protection applicable to tenured teachers under Wisconsin law.

ees who fail to meet minimum score requirements on an objective test, employees who are adversely affected by a competency test may successfully allege the denial of a property right to continued employment. Particularly in those cases in which the adversely affected employee has been evaluated as having performed satisfactorily, the expectancy of continued employment may be sufficiently cognizable to warrant a judicial determination that a property right is involved.[34]

However, even if the employee established the existence of a constitutionally protected liberty or property right, education agencies can effectively counter by showing that they have provided adequate notice of the test requirements. The *Debra P.* court viewed adequate notice to require setting the effective date of new testing requirements far enough in advance to permit adequate student preparation.[35] In the context of teacher competency testing, agencies may avoid due process objections by forewarning employees about test requirements so as to enable employees to prepare for the exam.

In addition to adequate notice of requirements if a constitutional liberty or property interest is at stake, the fifth circuit recognized that students must receive fundamentally fair treatment before being denied a diploma.[36] Fairness in this context depends on "curricular validity," which required testing on materials actually taught.[37] However, if teacher tests purport to measure an applicant's competency for a particular job, then courts may demand validation in terms of job-relatedness, consistent with the more rigorous regulatory validation requirements under title VII of the Civil Rights Act of 1964.[38]

Testing Applications and Limitations

The most often utilized "ready made" objective test is the National Teacher's Examination (NTE), constructed by Educational Testing Service (ETS). When NTE tests are used by school districts, ETS provides guidelines which state:

> The current NTE tests were developed to provide information about candidates' academic knowledge and skills, typically acquired through a teacher-training program. They do not provide a direct evaluation of teaching performance. For this reason, NTE tests should not be used by school districts, directly or indirectly, to determine the compensa-

34. *See* Perry v. Sindermann, 408 U.S. 593 (1972). In Sindermann, the Court held that a professor, with several years of satisfactory teaching at an institution lacking a formalized tenure system, may nevertheless have a reasonable expectancy of continued employment entitling him to adequate due process protections prior to any termination of employment.

35. 474 F. Supp. at 266.

36. 644 F.2d at 404.

37. *Id* at 405.

38. *See* 29 C.F.R. §1607.1-.16 (1984). Although the guidelines lack the force of law, the Supreme Court has accorded them varying degrees of deference as the enforcing agencies' interpretation of title VII. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-36 (1975) and Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

> tion, retention, termination, advancement, pay supplements, or change in provisional employment status of teachers once they are employed. Such decisions about teachers in service should be based on teaching competencies as determined directly by the supervisory and evaluation procedures of the employing school district.
>
> The current NTE tests measure knowledge and skills needed by the beginning teacher; more is required of the teacher in service. . . . If current NTE tests are to be used as part of a program of continuing professional education, they should not be used, either directly or indirectly, for determining the compensation, retention, termination, advancement, pay supplements, or change in provisional employment status of teachers once they are employed.[39]

The explicit limitations for NTE utilization established by ETS may encourage the development of in-house objective tests by state education agencies, but the costs of development and validation may be prohibitive for local school districts. Even in-house tests are unlikely to meet the rigorous validation standards adopted by the Equal Employment Opportunity Commission under the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines).[40] As a consequence, the extent to which a public education agency or local school district can rely on objective test results in making employment decisions will depend on the burden of proof imposed by judges in determining whether a competency test is sufficiently job-related to justify its discriminatory effect.

Test validation is the method for establishing the job-relatedness of employment tests. Judicial standards for validation must ultimately delineate the employer's burden in validating a challenged selection process and can influence test use through the costs associated with a particular validation strategy.[41]

Judicial reluctance to apply the stringent validation requirements suggested by the Uniform Guidelines would appear to simplify a state education agency or school district's burden to show the job-relatedness of a challenged employment selection standard. If federal courts continue to accept a standard or curricular validity, measuring the correspondence between materials tested and materials taught, validation of teacher competency tests without reference to successful performance on the job will significantly reduce the employer's burden to demonstrate the job-relatedness of the test. However, it is not clear whether the employer's burden to justify the job-relatedness of a particular test might depend on the nature of the employment decision involved.

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39. Educational Testing Service, Guidelines for Proper Use of NTE Tests 7 (1983).
40. 29 C.F.R. § 1607 (1984).
41. *See* 41 C.F.R. § 60.3.5A (1983) for validation options under the Uniform Guidelines.

Certification

Use of objective testing as a prerequisite to professional certification appears legally permissible when the validation strategy emphasizes knowledge reasonably related to that which is taught in the educator's professional training program. While such a certification criterion would be legally sufficient wholly aside from the possible relationship between the test and actual job performance, its use is justified on the basis that school boards and state education agencies may insist upon a minimum level of knowledge related to academic preparation for teaching.

In *United States v. South Carolina*, the federal court acknowledged that the state's validation study measured the test's correspondence with the content of academic teacher training programs rather than its ability to predict job performance, and upheld the strategy.[42]

The use of a teacher competency examination for purposes of recertification at periodic intervals could be justified as a circumstance analogous to *United States v. South Carolina*. The state's power to regulate by examination clearly applies to entry into the teaching profession, thus continued assessment of the teacher's knowledge of subject matter relevant to teaching would appear to be justified. As certification is regarded as a property right once it is vested, recertification guidelines should include due process protections such as timely notice of requirements, remediation for those who fail to meet the minimum acceptable score, and opportunities for examination retakes.

Salary Award and Merit Pay

The opinion in *United States v. South Carolina* upheld the use of minimum score requirements for determining teacher salary levels, based upon evidence showing a rational relationship between test use and the state's legitimate objective of providing an incentive for professional improvement, encouraging teachers without adequate knowledge of education or related specialized fields to upgrade that knowledge.[43] While salary supplements to test certified as opposed to noncertified teachers might rest exclusively upon an objective score requirement, it is questionable at what point a court would intervene when salary discriminations between certified teachers are predicated exclusively upon differences in test scores. Furthermore, where other indicators are available as discriminators of teacher performance, discontinuities between those indicators and test results may lead to judicial review of a salary supplement or merit pay system which has a disparate impact on a minority.

Setting cut-off scores at discrete intervals in order to award teachers salary supplements is subject to attack on the basis that the cut-off

42. 445 F. Supp at 1094.
43. *Id.*
44. 400 F. Supp. 343 (E.D.N.C. 1975), *vacated*, 425 F. Supp. 789 (E.D.N.C. 1977).

scores are not validated in relation to teacher performance standards. Not only would the approach be inconsistent with the use of objective tests proposed by ETS, but the issue of examination validity could be compounded by judicial review of the method for adopting the discrete intervals utilized as a basis for salary awards. In *United States v. North Carolina*, a federal distict court issued an injunction against use of the NTE for teacher certification purposes because the NTE cut-off score requirement was set without consideration of its implications for selecting teachers for hiring. In this case, and in *York v. Alabama State Board of Education*,[45] the failure of school boards to consider the admonitions of ETS against adoption of a cut-off score without careful investigation and validation in relation to teacher performance standards was a determining factor in awarding preliminary injunctions against use of the test.

Adverse Employment Decisions

The United States Supreme Court has recognized the authority of a school board to enforce a state-mandated continuing education requirement, holding that nonrenewal of contract, when imposed uniformly on those teachers who refused to comply with the requirement, was rationally related to a valid state purpose.[46] Use of a standardized test to assess compliance with a state-mandated or board adopted continuing education requirement would appear to meet the rational basis test, provided the test was a valid measure of continuing education subject matter.

However, the use of minimum scores on standardized tests as the sole criterion for adverse employment decisions affecting inservice teachers would certainly be subject to heightened judicial scrutiny upon a showing of disparate impact under title VII. It is possible federal courts would vary from the application of curricular validation standards for the use of objective tests by compelling a school district to present evidence of a correlation between test results and job performance in order to justify use of the test in situations involving dismissal, nonrenewal, demotion or similar adverse employment decisions. Since testing services encourage reliance upon multiple measures in evaluating employees and other measures of employee performance are available, often mandated by state or local policy, exclusive reliance upon test results would seem suspect, particularly where the validation strategy is limited to curricular validity.

Wholly apart from the issue of test validation, a court could find evidence of performance appraisal, particularly classroom evaluation, so in conflict with test results as to effectively contradict a school board's claim that reliance on test results constitutes a business neces-

45. 581 F. Supp. 779 (M.D. Ala. 1984).
46. Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979).

sity within the meaning of title VII. In *Albemarle Paper Co. v. Moody*,[47] the United States Supreme Court noted that even upon a showing of job-relatedness, a plaintiff may show that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" While courts are reluctant to impose a judgment as to the suitability of alternatives, a school district or state agency which has adopted a performance appraisal system would be vulnerable if it chose to rely solely on competency examinations and ignored conflicting evidence produced from direct observation of teacher performance. Even though the latter appraisals may be characterized as subjective, their adoption and use by the education agency would permit judicial recognition that a suitable alternative means for assessing teacher competency is available.[48]

Adverse employment decisions often implicate property rights that compel due process protections for the employee. As in other applications of teacher competency testing, timely notice, coupled with opportunities for remediation and retesting are integral, particularly for tenured or continuing contract teachers.

Conclusions

Use of nationally standardized tests as a basis for determining teacher competency has been and will continue to be a subject for judicial review in both state and federal courts. State and local school district policies requiring competency testing of teachers have advanced the use of minimum score requirements as a basis for employment decisions relative to certification, hiring, renewal, promotion and merit pay. Legal challenges to these policies focus upon the constitutional guarantees of due process and equal protection as well as on the "disparate impact" provisions of title VII of the Civil Rights Act of 1964.

The extent to which local school districts or state education agencies may rely upon competency testing in setting education policy related to teaching is uncertain. As techniques for assessing teacher performance continue to be developed and implemented in public schools, reliance upon objective test scores as a principal determinant in employment decision-making may be limited to instances in which no other evaluative information on job performance is available. As a criterion for certification, a guide to the initial hiring decision or as one of several factors in determining salary subsidy or promotion, a strong legal basis for the minimum competency testing of teachers or prospective

47. 422 U.S. 405 (1975); *accord* Connecticut v. Teal, 457 U.S. 440 at 447 (1982).

48. *But see* Newman v. Crews, 651 F.2d 222 at 225 (4th Cir. 1981). While the court granted that a performance evaluation system might be useful in identifying areas for teacher improvement, it took notice of the fact that the existing evaluation system was subjective and inexact and concluded there was no reason to suppose such a system would not involve substantial potential for discrimination, particularly when compared with what the court described as the "complete objectivity" of the NTE.

teachers has evolved. The use of a minimum competency test as the sole criterion in undertaking adverse employment decisions, setting discrete salary differentials or standards for merit pay is, however, a suspect practice which will compel judicial scrutiny particularly where discriminatory practice is at issue.

Plaintiffs who challenge teacher competency testing requirements must overcome formidable obstacles in asserting a property interest worthy of due process protection or establishing an employer's discriminatory intent as a predicate for strict judicial scrutiny. Uncertain validation standards and ambiguities in the shifting burden of proof under title VII create additional impediments. However, the uncertainty of predicting outcomes involving legal challenges to various forms of teacher competency testing, coupled with the likelihood that teacher's unions and civil rights groups will specifically target teacher competency testing in situations other than certification, increases the prospect for legal challenges.

School boards and state agencies must take extreme care to draft testing policies which correspond to appropriate educational objectives and reflect approved validation strategies. Efforts to eliminate racial and cultural bias in test items and to set minimum score requirements that are fair and equitable must be documented. Gradual phase-in of testing requirements and pilot-testing, coupled with timely notice of test objectives, subject matter coverage and intended use should be incorporated in policy implementation. Finally, applicants and employees should be advised of areas in which deficiencies are identified and provided with opportunities for reexamination. Remedial assistance to employees who fail to meet score requirements may also be warranted.

In the context of litigation involving teacher competency testing, settlement options should not be ignored. Despite reluctance to intervene in educational policy-making, judges often demonstrate heightened sensitivity to employment issues, particularly in instances in which cross-cutting social issues such as discrimination are implicated. In these cases, judicial uncertainty about appropriate validation standards and the shifting burden of proof involving disparate impact make for potentially complex, fact intensive and costly litigation. Often, an agreement between the parties can be negotiated which will permit use of the competency examination as a factor in employment decision-making while providing safeguards insuring fair and equitable treatment of the employee.[49]

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49. *See* Allen v. Alabama State Bd. of Educ., 612 F. Supp. 1046 (S.D. Ala. 1985). Settlement agreement charged a three-person panel with monitoring and overseeing the test development process and created panels of black educators to review examinations for potential bias and make recommendations to the state board.